

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 DAPHNE P. RAND, by and through, DEBRA J.  
12 DOLCH, Special Administrator of the Estate of  
Daphne P. Rand,

No. C 09-0639 SI

**ORDER GRANTING MOTION FOR  
SUBSTITUTION**

13 Plaintiff,

14 v.

15 AMERICAN NATIONAL INSURANCE  
COMPANY,

16 Defendant.

17 \_\_\_\_\_ /  
18 Movant Debra Dolch's motion for substitution is scheduled for a hearing on June 25, 2010.  
19 Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for resolution without oral  
20 argument and hereby VACATES the hearing. Having considered the papers submitted, the Court  
21 GRANTS the motion.

23 **BACKGROUND**

24 On February 12, 2009, plaintiff Daphne R. Rand, by and through Debra J. Dolch as conservator  
25 of the Person and Estate of Daphne R. Rand, brought a class action lawsuit against defendant American  
26 National Insurance Company (ANIC). Compl. ¶ 1. Dolch had previously been appointed the  
27 conservator of Rand and Rand's estate.

28 An annuity is a contract between an insurance company and the annuitant. The annuitant makes  
payments, either in installments or in one lump-sum to the insurance company. *Id.* ¶¶ 16-17. A deferred

1 annuity postpones payment to the annuitant until some agreed upon point in the future. During the  
2 deferment period, the principal gains interest, but there is a penalty for withdrawing the money early.  
3 *Id.* ¶¶ 17, 19. The complaint alleges that when she was 86 years old, Rand purchased two annuities from  
4 ANIC, one for \$50,000 (Benchmark Policy 1) and one for \$354,660 (Benchmark Policy 2). *Id.* ¶¶ 40-  
5 41. Both policies would not mature until 2025 when Rand was 106 years old. *Id.* According to  
6 defendant, Dolch received permission from the San Francisco Probate Court to exercise discretion over  
7 the annuities. She then withdrew all funds from the \$50,000 policy, subjecting the estate to early  
8 surrender penalties, and withdrew some money from the second policy.

9 Count 1 of the complaint alleges that ANIC violated California Business & Professions Code  
10 §§ 17200 *et seq.* by not properly disclosing all of the material facts and risks associated with the  
11 purchase of a deferred annuity, failing to conduct itself with persons over 65 in good faith, and issuing  
12 or approving advertising that was deceptive or misleading to persons over 65. *Id.* ¶¶ 65-71. Count 2  
13 of the complaint alleges ANIC has violated California Business & Professions Code § 17500 by  
14 participating in deceptive or misleading advertising relating to its deferred annuity products, and failing  
15 to fully disclose the nature of deferred annuities as pertaining to customers. *Id.* ¶¶ 72-84. Finally, Count  
16 3 alleges that ANIC has committed elder abuse as defined in California Welfare & Institutions Code  
17 § 15600 *et seq.* *Id.* ¶¶ 88-93. The complaint seeks class certification; temporary, preliminary, and  
18 permanent injunctive relief; restitution for the plaintiff and the class; compensatory damages; punitive  
19 and exemplary damages; treble damages and penalties; transfer of the wrongfully obtained money; and  
20 the imposition of a constructive trust. Prayer for Relief ¶¶ A-O.

21 Rand died on March 16, 2010,<sup>1</sup> and on March 25, 2010, the State of California appointed Debra  
22 J. Dolch Special Administrator, with the special powers to substitute for Rand as named plaintiff in this  
23 suit specifically. Evan Decl. Ex. A On the same day, Dolch filed a suggestion of death for Daphne P.  
24 Rand , as well as the instant motion to substitute. The actual death record was filed later. Evans Reply  
25 Decl. Ex. A.

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27  
28 <sup>1</sup> Defendant has filed a discovery motion regarding a mailing by plaintiff's counsel regarding  
Rand's death. The Court will issue an order regarding that motion shortly.

**LEGAL STANDARD**

Rule 25(a)(1) of the Federal Rules of Civil Procedure provides “if a party dies and the claim is not extinguished, the Court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent’s successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.” Fed. R. Civ. Proc. 25(a)(1). The procedural requirements, determined by both the express language of the rule as well as case law, must be satisfied in order for a court to grant the motion for substitution. The only parties who may then be substituted are legal representatives of the deceased. *Mallonee v. Fahey*, 200 F.2d 918, 919 (9th Cir. 1952). Additionally, whether a claim has been extinguished and is therefore ineligible for substitution under Rule 25(a)(1) is determined by the forum under which the claim arose. *Bracken v. Harris & Zide, LLP*, 219 F.R.D. 481, 483 (N.D. Cal. 2004); *Continental Assurance Co. v. American Banshares Corp.*, 483 F. Supp. 175, 177 (E.D. Wis. 1980). Finally, if all the requirements are met and the claim has not been extinguished, the Court still retains the discretion to deny the motion. See *Anderson v. Yungkau*, 329 U.S. 482, 485-86, 491 (1947); *Saylor v. Bastedo*, 623 F.2d 230, 237 (2d Cir. 1980).

**DISCUSSION****I. Dolch has met the procedural requirements necessary for substitution**

To satisfy the requirements of Rule 25(a)(1), a motion must be made within ninety days after the service of a statement noting the death of a party. Fed. R. Civ. P. 25(a)(1); *Anderson v. Aurotek*, 774 F.2d 927, 931 (9th Cir. 1985). To trigger the start of the ninety day period, the suggesting party must formally submit a suggestion of death for the record as well as serve other parties in accordance with Rule 5(b) which requires service to the other party’s attorney or under the other forms listed under 5(b)(2) if it is not represented by an attorney. *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994); Fed. R. Civ. P. 5(b).

ANIC does not contest that plaintiff has met the procedural requirements for a Rule 25(a)(1) substitution. The suggestion of death and the motion for substitution were both filed on March 25, 2010. Defendant is represented by counsel so there is no need to worry about Federal Rule of Civil Procedure

1 5(b) as the attorney was served. The Court finds that Dolch has met the procedural requirements for the  
2 substitution.

3

4 **II. Dolch is a proper party for substitution**

5 **A. Dolch is a legal representative<sup>2</sup>**

6 In the Ninth Circuit “Rule 25(a)(1) applies only to the substitution of legal representatives.”  
7 *Mallonee v. Fahey*, 200 F.2d 918, 919 (9th Cir. 1952). Section 58 of the California Probate Code, states,  
8 *inter alia*, that a “special administrator” qualifies as a personal representative. Cal. Prob. Code § 58  
9 (Deering 2009). Dolch has been appointed the Special Administrator for Rand and therefore the Court  
10 finds that she meets the requirement set forth in *Mallonee*.

11

12 **B. Rand’s claims were not extinguished when she died and may be pursued by Dolch**  
13 “If a party dies and the claim is not extinguished, the court may order substitution of the proper  
14 party.” Fed. R. Civ. P. 25(a)(1). The question of whether a claim is extinguished by the death of a party  
15 is determined by the law of the forum under which the claim arose. *Bracken v. Harris & Zide*,  
16 LLP, 219 F.R.D. 481, 483 (N.D. Cal. 2004); *Continental Assurance Co. v. American Banshares Corp.*,  
17 483 F. Supp. 175, 177 (E.D. Wis. 1980); *see also Ransom v. Brennan*, 437 F.2d 513, 520 (5th Circ.  
18 1971) (“Under general principles of conflict of law, whether a cause of action survives the death of a  
19 defendant is determined by the law of the jurisdiction in which the cause of action arose.”).

20 In California, Section 377.20(a) of the California Code of Civil Procedure is the survival statute  
21 that provides generally for the survival of actions. *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 782  
22 (Cal. 1997). This section states “except as otherwise provided by statute, a cause of action for or against  
23 a person is not lost by reason of the person’s death, but survives subject to the applicable limitations  
24 period.” Cal. Code Civ. Proc. § 377.20(a) (Deering 2009). In addition, Section 377.34 of the California  
25 Code of Civil Procedure states that recoverable losses are limited to those incurred before death. Cal.

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28 <sup>2</sup> Dolch originally moved to substitute both herself, in her capacity as the Special Administrator  
of the Rand’s Estate, along with the Estate itself. In response to ANIC’s argument that the Estate was  
not a proper plaintiff, Dolch narrowed her request and now seeks only to substitute herself as the  
successor in interest.

1 Code Civ. Proc. § 377.34 (Deering 2009); *Sullivan v. Delta Air Lines*, 935 P.2d 781, 784. Unless a  
2 specific statute state otherwise, claims are not extinguished upon death in California.

3 ANIC raises several challenges to Dolch's substitution. First, ANIC contends that Dolch lacks  
4 standing to bring a claim under Cal. Bus. & Prof. Code § 17200 because she cannot show reliance and  
5 injury stemming from that reliance. ANIC argues that Dolch cannot show reliance because no  
6 misrepresentations were made to Rand, and because Dolch was not present for the sales of the annuities  
7 and would therefore be unable to provide evidence of reliance. In addition, ANIC asserts that there is  
8 no admissible evidence Rand, as opposed to Dolch, made the decisions regarding surrendering the  
9 annuity policies, and thus Dolch cannot show that Rand's reliance was the cause of her injury.  
10 However, as Dolch notes, these arguments go to the merits of the claims rather than Dolch's ability to  
11 substitute in this action. Moreover, reliance is only required under the fraud prong of the UCL, and is  
12 not an element under the "unfair" or "unlawful" prongs of that statute. Here, the complaint alleges  
13 violations of the UCL under all three prongs. To the extent defendant asserts that there is no evidence  
14 in support of the UCL claim, that is a matter for summary judgment.

15 In addition, ANIC contends that Dolch lacks standing to pursue any claims related to Benchmark  
16 Policy 2 because upon Rand's death, the interest of her designated beneficiary on that policy, the  
17 Jehovah's Witnesses, became vested. Dolch responds that Rand incurred damages both with regard to  
18 the purchase of the allegedly overpriced annuity, as well as the surrender charges deducted from her  
19 policy proceeds, and that those damages were incurred by Rand and not her beneficiaries.

20 Here, Rand has alleged claims under Cal. Bus & Prof. Code § 17200 *et seq.*; Cal. Bus. & Prof.  
21 Code § 17500 *et seq.*; and Cal. Welf. & Inst. Code § 15600 *et seq.* None of the these statutes provides  
22 that claims extinguish with the death of a party. See Cal. Bus. & Prof. Code § 17200 (Deering 2010);  
23 Cal. Bus. & Prof. Code § 17500 (Deering 2010); Cal. Welf. & Inst. Code § 15600 (Deering 2010). In  
24 addition, Section 377.20(a) of the California Code of Civil Procedure states that actions started before  
25 death do not extinguish with the death of a party. *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 782  
26 (Cal. 1997). Because the damages sought stem from events occurring before the death of the original  
27 plaintiff, the claims are not be extinguished by Section 377.34 of the California Code of Civil Procedure  
28 which limits recoverable losses to those incurred before death. Cal. Code Civ. Proc. § 377.34 (Deering

<sup>1</sup> 2009); *Sullivan*, 935 P.2d at 784.

## CONCLUSION

4 For the foregoing reasons and for good cause shown, the Court hereby GRANTS the motion to  
5 substitute Debra J. Dolch, as a Special Administrator of the Estate of Daphne P. Rand, as successor in  
6 interest to plaintiff Daphne P. Rand. (Docket No. 96).

## IT IS SO ORDERED.

Dated: June 22, 2010

Susan Illston

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**SUSAN ILLSTON**  
United States District Judge